U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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Washington, DC 20529-2090

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U.S. Citizenship and Immigration Services

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[redacted]

DATE: DEC 15 2011 OFFICE: TEXAS SERVICE CENTER [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:
Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability in the sciences and as a member of the professions holding an advanced degree. The petitioner seeks employment as a physician. At the time he filed the petition, the petitioner was a fellow in medical oncology at [redacted]. U.S. Citizenship and Immigration Services (USCIS) records indicate that he now works for the University [redacted] The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel, a new witness letter, and various exhibits, most of them previously submitted.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The petitioner claims eligibility for classification both as a member of the professions holding an advanced degree and as an alien of exceptional ability in the sciences. The record readily establishes that the petitioner, whose occupation requires at least a bachelor's degree and who holds a degree equivalent to a United States M.D. degree, qualifies as a member of the professions holding an advanced degree. A determination regarding the petitioner's claim of exceptional ability would be moot; it would occupy significant space in this decision, without affecting the ultimate outcome thereof.

The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now USCIS] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation (*NYSDOT*), 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. Next, the petitioner must show that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The intention behind the term "prospective" is to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The AAO also notes that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner electronically filed the Form I-140 petition on June 23, 2010. Because the electronic filing included no supporting exhibits, the director issued a request for evidence (RFE) on July 29, 2010. In the RFE, the director instructed the petitioner to submit evidence to meet the three prongs of the national interest test outlined in *NYSDOT*.

In response, the petitioner submitted documentation of his medical credentials and a *curriculum vitae* listing the following experience:

Fellowship Training

06/01/09 to Present.
Fellow, Medical Oncology
[redacted]

Post Residency Work Experience

09/01/08 to 05/31/09
Hospitalist, Internal Medicine
[redacted] Physician Services
[redacted]

Residency Training:

07/01/09 to 08/31/09
Chief Resident
Department of Internal Medicine.
[redacted]

07/01/2005 to 06/30/2009
Resident
Department of Internal Medicine
[redacted]

The *curriculum vitae* listed three items under the heading "Publications/Research." Two of the items were scholarly articles. The petitioner indicated that one article appeared in the *Journal of Investigative Medicine* [redacted] and the other was "awaiting publication" in the *Journal of the* [redacted] *Medical Association*. Each article (reproduced in the record in manuscript form) centered on the presentation of one patient's case. The third item indicated that the petitioner was "Currently Involved in National Institutes of Health's [redacted]
[redacted]

As shown above, the petitioner acknowledged that his current position amounted to "training." The petitioner submitted no documentary evidence to show that he would continue to engage in research after his training was complete.

The petitioner submitted copies of three letters, all from witnesses on the faculty of [redacted] Medicine. [redacted] an associate clinical professor, stated:

> I am familiar with [the petitioner's] work and his impressive reputation as a clinician in the field of cancer care. I first met him as a resident on my service and thereafter as a colleague. . . .
>
> [T]he treatment of cancer patients is national in scope. The treatment of cancer patients in [redacted] certainly would benefit citizens of that state . . . however, citizens of states other than [redacted] or patients with family in states other than [redacted] would be treated by [the petitioner]. As cancer research has shown, the work of medical or scientific professionals in one part of the country results in benefits for those affected by cancer all over the country. . . .
>
> I know that [the petitioner] was both an exceptionally capable student and is a highly competent physician. . . . He is published in peer-reviewed journals and is currently involved with the National Institute of Health's [redacted] – itself a prestigious appointment and accomplishment unmatched by many U.S. physicians.
>
> Given his level of qualifications and abilities, there is a national interest in having [the petitioner] avoid the labor certification process. In my opinion, he would serve the United States to a substantially greater degree than a similarly-situated U.S. worker.

[redacted] an associate clinical professor, stated:

> [The petitioner] is a Medical Oncology Fellow at [redacted] I supervise him and know him through his work. . . .
>
> Notably, [the petitioner] received a Case Report Award for oral presentation at the 2007 [redacted] This is a regional competition in which hundreds of residents from different training programs participate. To be a recipient of an award is considered to be an outstanding accomplishment. . . .
>
> Furthermore, [the petitioner] is currently involved with a project called the Cancer Stories Project, sponsored by [redacted] which will provide valuable information regarding communication with cancer

> patients. This is a very unique endeavor. NIH sponsored grants are extremely competitive and difficult to obtain.

Professor [redacted] repeated the assertion that the petitioner "is involved with the National Institute of Health's [redacted] This is a major accomplishment for any physician in the field of cancer research and treatment." [redacted] also observed that the petitioner had written two articles, one published and one awaiting publication, but provided no other details about the petitioner's work.

The director denied the petition on August 31, 2010. In the denial notice, the director acknowledged the intrinsic merit of medicine, but found that the petitioner had not shown that his intended future work has national scope. Rather, the director determined that the petitioner's "impact will be limited to the hospital in which he will practice; therefore, the benefit of his skills will be limited to a small area." The director also found that the petitioner failed to distinguish himself from other physicians to an extent that would justify an exemption from the statutory job offer requirement.

On appeal, counsel states:

> The language of the Denial belies the minimal analysis performed by the Service in reviewing the Petition. In turns, [the petitioner] is mischaracterized as a "gastroenterologist" when really he is an oncologist. Specific mention was made to the absence of evidence of his state licensure when a copy of that license in fact had been submitted. Further, the content of carefully prepared supporting letters from prominent colleagues was dismissed summarily as "mere assertions of widespread acclaim and vague claims of contributions."

It is true that the director erroneously used the term "gastroenterologist," and incorrectly concluded that "the record does not contain a copy of a state license." Nevertheless, the director also quoted each of the witness letters and accurately described other materials in the record. The director's erroneous statements, therefore, do not prove that the director failed to review the record of proceeding. More importantly, the director did not deny the petition based on the faulty conclusion that the petitioner is a gastroenterologist, or the petitioner's supposed lack of state licensure. These mistakes, therefore, constitute harmless errors that do not compromise the overall decision.

The petitioner submits three new exhibits on appeal. An updated *curriculum vitae* indicates that the petitioner received a "Travel Grant [redacted] Sept'2010." The record contains no first-hand evidence to show that the petitioner even received this award, much less to establish its significance. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). Furthermore, even if the petitioner had shown that this travel award was evidence of eligibility, he received it after the petition's June 2010 filing date. An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of

filing the application or petition. 8 C.F.R. § 103.2(b)(1). USCIS cannot properly approve the petition at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

The petitioner also submits a certificate showing his admission to associate membership in the American Society of Hematology. This certificate fails, for a number of reasons, to establish the petitioner's eligibility for the waiver. The date on the certificate is August 13, 2010, after the petition's filing date. Also, the petitioner has submitted nothing to show the significance of this associate membership. The certificate refers to "a significant contribution to the field of hematology," but does not elaborate. Also, the AAO cannot ignore that, up to this point, the waiver claim rested heavily on the petitioner's work in the medical specialty of oncology (relating to cancer). Hematology is a separate specialty, concerning diseases of the blood.

The remaining new exhibit is a letter from [redacted] College of Medicine. [redacted] states:

> [The petitioner] is currently involved with a project called the Cancer [redacted] (the "Project"), sponsored by the [redacted] This Project is a ground-breaking study to obtain valuable information regarding communication with cancer patients. This is an extremely prestigious appointment and accomplishment which would not be achieved by many U.S. physicians. [The petitioner] would not have been invited to participate in the organization and analysis of this significant work if he were not already a very distinguished member of his profession.
>
> [The petitioner's] published work already shows his original contributions to the field of cancer care. His study on [redacted] . . confirmed that smoking cessation was the most effective and only available treatment. He also has published an important study on the primary mediastinal Yolk Sac Tumor. His work was original and of major significance because it addressed the causes and likely outcomes based on an analysis of particular case studies. It is through such analysis that other physicians can learn how to treat similar cases in their own hospitals. To that end, [the petitioner] also was awarded a travel grant to attend the [redacted] Cancer Symposium [redacted] . . . .
>
> His publications are read by physicians throughout the United States, and his expertise as a physician has benefits for other practitioners, researchers, patients and their families alike.

[redacted] asserts that the petitioner's membership in four named professional associations "shows the widespread acceptance of his achievements throughout a select group of physicians within our country's medical community."

With respect to [redacted] letter and the witness letters submitted previously, counsel asserts that the witnesses are "prominent colleagues" of the petitioner. The record contains no independent evidence to establish the witnesses' prominence in the field of medicine in general or oncology in particular. All of the witnesses are on the faculty of a single university medical school. Their statements, therefore, are not first-hand evidence that the petitioner's work has attracted any significant notice outside [redacted]

The opinions of experts in the field are not without weight and the AAO has considered them above. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r 1988). USCIS is, however, ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; USCIS may, as the AAO has done above, evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795. USCIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *see also Matter of D-R-*, 25 I&N Dec. 445, 460 n.13 (BIA 2011) (discussing the varying weight that may be given expert testimony based on relevance, reliability, and the overall probative value).

The record contains no documentary evidence to support the claim that participation in the [redacted] is "a prestigious appointment and accomplishment unmatched by many U.S. physicians." Any given medical research program in the United States will, by its very nature, involve only a small fraction of all United States physicians. This does not prove or imply, however, that the participating physicians are somehow superior to non-participants. It is the petitioner's burden to establish the prestige of his involvement in the program. The petitioner has not even submitted documentary (as opposed to testimonial) evidence of his participation in the program at all, let alone to show that his involvement is "prestigious."

With respect to [redacted] letter, the record does not establish how difficult it is to obtain "NIH sponsored grants." More importantly, even if such grants are difficult to obtain, the record contains no evidence that it was the petitioner who obtained the grant. If he joined a project already in progress, or conceived by others, then the difficulty of obtaining the grant is irrelevant to the petitioner's talents or contributions.

[redacted] letter contains a broader range of claims than the previous letters, but these claims, like those before them, have no evidentiary support in the record. [redacted] has done little more than list the items on the beneficiary's *curriculum vitae* and declare that they establish the petitioner's eligibility for the waiver.

[redacted] assertion that the petitioner's "publications are read by physicians throughout the United States" lacks credibility on a number of levels. [redacted] refers to the petitioner's "publications," plural, but also acknowledges that the petitioner's second article is still awaiting publication. At the time, therefore, the petitioner had only one "publication." Furthermore, there is simply nothing in

the record to support the claim that "physicians throughout the United States" have paid attention to the petitioner's one published article. The article relates to an oral presentation said to have won a regional prize, but the assertion that the petitioner's "publications are read by physicians throughout the United States" is unsupported speculation. The record overwhelmingly indicates that the petitioner's body of work, as a whole, has attracted little notice outside of [redacted] where all of the petitioner's witnesses serve on the faculty).

Counsel asserts that the petitioner's "work towards the cure of cancer [is] national in scope." Published research is national in scope, but the petitioner's minimal research record appears to be tied to his ongoing training at [redacted] The record is devoid of evidence that the petitioner will be a researcher, rather than a clinical oncologist, after he completes his training. Furthermore, the only research that the petitioner appears to have been conducting as of the petition's filing date is the oft-touted NIH project which, according to witnesses, concerns "communication with cancer patients" rather than "the cure of cancer." The intrinsic merit of oncology, as a specialty, is not in dispute here. Nevertheless, the petitioner's choice of career is not self-evident proof of eligibility for the national interest waiver, because there exists no blanket waiver for alien oncologists. As members of the professions holding advanced degrees, alien oncologists are collectively subject to the statutory job offer requirement at section 203(b)(2)(A) of the Act.

It cannot suffice for the petitioner's close colleagues to express praise for the petitioner's minimally documented achievements. The AAO will affirm the director's decision to deny the petition.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.